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No. 99-1030

IN THE
Supreme Court of the United States

CITY OF INDIANAPOLIS, *et al.*,

Petitioners,

v.

JAMES EDMOND, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

BRIEF OF KANSAS AND THE *AMICI* STATES IN SUPPORT OF THE CITY OF INDIANAPOLIS, ET AL.

CARLA J. STOVALL
Kansas Attorney General
STEPHEN R. MCALLISTER
Kansas State Solicitor
(Counsel of Record)
JARED S. MAAG
Assistant Attorney General
120 S.W. 10th Avenue, 2nd Fl.
Topeka, Kansas 66612-1597
(786) 296-2215

Counsel for Kansas and the Amici States

[Additional Counsel Listed After Conclusion]

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Drug Enforcement Administration, U.S. Dep't of Justice, *Drug Statistics* (visited Apr. 21, 2000) <http://www.usdoj.gov/dea/stats/drugstats.htm> (current through June 14, 1999) 1
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National Archive of Criminal Justice Data
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INTERESTS OF THE *AMICI* STATES

The States have a significant interest in preventing drug trafficking, not only within their respective borders, but throughout the nation as a whole. Towards that end, drug roadblocks have proven to be an effective means of slowing and interrupting the ever increasing flow of illegal narcotics that pass along major drug corridors[1] and city streets.[2]

Thus, the constitutionality of such measures under the Fourth Amendment is important to the States in their ongoing efforts at drug interdiction. To date, both state and federal courts have issued differing opinions on the legality of such

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[1] In particular, two major drug corridors run through Kansas, I-35 (north-south) and I-70 (east-west). *United States v. Klinginsmith*, 25 F.3d 1507, 1510 n.1 (10th Cir. 1994) ("I-35 is a known avenue for drug transportation"); *United States v. Sanchez*, 866 F. Supp. 1542, 1554 (D. Kan. 1994) (Defendant's rental van was traveling on I-70, a known drug trafficking route).

[2] For a statistical analysis of both arrests and seizures in the United States see Drug Enforcement Administration, U.S. Department of Justice, *Drug Statistics* (visited Apr. 21, 2000) <http://www.usdoj.gov/dea/stats/drugstats.htm> (current through June 14, 1999). For further statistics see also Bureau of Justice Statistics, U.S. Department of Justice, *Drug & Crime Facts* (last modified Apr. 7, 2000) <http://www.ojp.usdoj.gov/bjs/dcf/contents.htm> (summarizing U.S. statistics about drug-related crimes, law enforcement, courts, and corrections from Bureau of Justice Statistics (BJS) and non-BJS sources); National Archive of Criminal Justice Data (visited Apr. 21, 2000) <http://www.icpsr.umich.edu/NACJD/home.html> (provides browsing and downloading access to over 500 data collections relating to criminal justice); Office of National Drug Control Policy (last modified Apr. 4, 2000) <http://www.whitehousedrugpolicy.gov> (cross-disciplinary reference to facts and figures organized by specific drug type. Also includes statistics on prevalence and consequences of drug use, adjudication of drug offenders, and production, trafficking, and distribution patterns taken from federal and state government publications), and 1998 FBI Uniform Crime Report for the United States.

roadblocks.[3] Consequently, some states are given the authority to implement a system of roadblocks while other states must forgo that opportunity. This case provides the Court with an opportunity to determine the constitutionality of at least some of these roadblocks.

SUMMARY OF THE ARGUMENT

In *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), this Court stated that "reasonableness" is the ultimate question when addressing situations involving checkpoint "seizures." *Id.* at 450. In doing so, the Court rejected any notion that a balancing analysis must be predicated on a showing of some special governmental objective beyond the general need for criminal law enforcement. *Id.* at 449-50. The reasonableness of drug roadblock checkpoints therefore turns on the balancing test established in *Brown v. Texas*, 443 U.S. 47 (1979), which directs that, in considering the constitutionality of "less intrusive seizures," a court must weigh (1) the "gravity of the public concerns served by the seizure," (2) "the degree to which the seizure advances the public interest," and (3) "the severity of the interference with individual liberty." *Id.* at 50-51. (citation omitted). Applying *Brown* to drug roadblocks yields the conclusion that this effective law enforcement technique is constitutional, at least in many circumstances.

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[3] *Compare United States v. Huguenin*, 154 F.3d 547 (6th Cir. 1998); *United States v. Morales-Zamora*, 974 F.2d 149 (10th Cir. 1992); *Galberth v. United States*, 590 A.2d 990 (D.C. 1991); and, *Commonwealth v. Rodriguez*, 722 N.E.2d 429 (Mass. 2000), each holding drug roadblocks to violate the Fourth Amendment, *with Merrett v. Moore*, 58 F.3d 1547 (11th Cir. 1995); *State v. Damask*, 936 S.W.2d 565 (Mo. 1996) (en banc); and *State v. Everson*, 474 N.W.2d 695 (N.D. 1991), which held these types of roadblocks to be legal. *Cf. Wilson v. Commonwealth*, 509 S.E.2d 540, 29 Va. App. 63 (1999) (insufficient evidence presented to support public concern prong of *Brown* for particular checkpoint; however, checkpoints not per se unconstitutional).

First, given the magnitude of the illegal drug trafficking problem throughout the United States, and its association with criminal activity of all sorts, the public concern over minimally intrusive drug roadblocks is a rhetorical question at best. Second, the public interest is best served by law enforcement techniques that effectively stem the tide of an illicit trade which affects both directly and indirectly every citizen, while balancing each citizen's right to be free from "unreasonable" seizures. Finally, the intrusive nature of these roadblocks is clearly minor. In short, there is no reason for the Court to deviate from the principle announced in both *Sitz* and *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), that the intrusion on motorists during similar type roadblocks is both "slight" and "quite limited," *Sitz*, 496 U.S. at 451; *Martinez-Fuerte*, 428 U.S. at 557, when the exchanges during the roadblocks in question are virtually identical.

Simply put, the issue is one of reasonableness, and given the circumstances surrounding the implementation of drug roadblocks for interdiction purposes, no justifiable basis exists for the Court to depart from its well-established precedent that already essentially declares these roadblocks "reasonable" under the Fourth Amendment.

ARGUMENT

I. DRUG ROADBLOCKS ARE CONSTITUTIONAL IF THEY ARE REASONABLE.

The Fourth Amendment prohibits only "unreasonable" searches and seizures.[4] *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). Thus, as a general rule,

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[4] "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized." U.S. CONST. amend. IV.

either probable cause or individualized suspicion is necessary to seize an individual suspected of criminal activity. *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968). Individualized suspicion, however, is not necessary in a roadblock scenario where the Court has required only a reasonableness analysis that balances a motorist's Fourth Amendment protections against the interests of the State. *Martinez-Fuerte*, 428 U.S. at 555. Applying that standard, this Court has routinely found, in a checkpoint context, that the public interest in detecting various forms of criminal activity outweighs any potential interference with individual liberty.

In 1976, this Court first addressed the suspicionless seizure of individuals at a United States Border Patrol checkpoint positioned to detect the illegal importation of immigrants into the United States. *United States v. Martinez-Fuerte*, 428 U.S. 543. The Court ultimately found that the United States had a legitimate interest in preventing the entry of illegal immigrants and that requiring individualized suspicion would be impractical given the flow of traffic and the inability of officers to reasonably identify those who are transporting illegal aliens. *Id.* at 557. The Court concluded that the roadblocks involved were minimally intrusive, that they served a legitimate public interest, and that the record before the Court supported the need for this particular technique. *Id.* at 562.

Some three years later, this Court in *Brown v. Texas*, 443 U.S. 47, established a framework for evaluating the constitutionality of roadblocks. *Id.* at 50-51. In addressing these "less than intrusive" seizures, the Court found that the reasonableness of the stop was dependent upon three factors: (1) the "gravity of the public concerns served by the seizure," (2) "the degree to which the seizure advances the public interest," and (3) "the severity of the interference with individual liberty." *Id.* (citation omitted). The reasonableness

of the checkpoint stop in light of these factors therefore is the determinative issue.

Eleven years later, this Court reinforced the proposition that reasonableness is at the core of any roadblock issue in *Michigan Department of State Police v. Sitz*, 496 U.S. 444. There, respondent maintained that some special governmental need "'beyond the normal need' for criminal law enforcement" must exist before a balancing analysis is employed. *Id.* at 450. The Court, however, soundly rejected the "special governmental need" requirement, finding *Martinez-Fuerte* and *Brown* to be the relevant authorities for an analysis of roadblocks under the Fourth Amendment. *Sitz*, 496 U.S. at 450.

As the drug roadblock in question in this case and those utilized by the States are virtually identical in both purpose and design to the roadblocks upheld in *Brown*, *Martinez-Fuerte*, and *Sitz*, there is no reason for this Court to deviate from the well-established reasonableness analysis applied in those cases.

The Seventh Circuit majority abandoned this straightforward analysis in holding Indianapolis's roadblock system unconstitutional. That court chose to analyze the reasonableness of the roadblock simply on the determination of whether "there is a basis for believing that a particular search or seizure . . . will yield evidence or fruits or instrumentalities of crime." *Edmond v. Goldsmith*, 183 F.3d 659, 665 (7th Cir. 1999). This decision to probe the "*purpose* behind the *program*" resulted in the lower court impermissibly focusing on the state of mind of those who established the checkpoint. *Id.* (emphasis added). Such an approach disregards this Court's holding in *Whren v. United States*, 517 U.S. 806 (1996), that there is no constitutional authority for judging the legitimacy of a traffic stop by assessing the actual motivations of the officers

involved. *Id.* at 811-13.[5] Indeed, this Court warned against the adoption of such a subjective test as it would necessitate individual inquiry into police activity, thus compromising the invariable nature of the protections embodied in the Fourth Amendment. *Id.* at 815.[6] Accordingly, any reasonableness evaluation of a particular roadblock must be made not from the subjective standpoint of the officers but rather objectively. *Id.* at 813.[7]

The proper test for the constitutionality of these particular roadblocks therefore is the balancing test of *Brown v. Texas*.[8]

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[5] This principle was reiterated in this Court's recent decision in *Bond v. United States*, 120 S. Ct. 1462, 1465 n.2 (2000) ("the issue is not [the officer's] state of mind, but the objective effect of his actions.").

[6] The Court concluded that "police enforcement practices, even if they could be practicably assessed by a judge, vary from place to place and from time to time. We cannot accept that the search and seizure protections of the Fourth Amendment are so variable." *Whren v. United States*, 517 U.S. at 815. (citations omitted).

[7] On this very point, the Court stated that "'the fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, *viewed objectively*, justify that action.'" *Whren*, 517 U.S. at 813 (citation omitted) (emphasis added).

[8] The *Brown* balancing analysis has been used in other checkpoint contexts. Several courts, in challenges to fish and game checkpoints, employ *Brown* for a constitutionality assessment. *See, e.g., State v. Albaugh*, 571 N.W. 2d 345, 347, 1997 N.D. 229 [8] (N.D. 1997) (listing cases).

II. UNDER THE *BROWN* BALANCING TEST, DRUG ROADBLOCKS ARE CONSISTENT WITH THE FOURTH AMENDMENT.

A. DRUG ROADBLOCKS ADDRESS A SERIOUS PUBLIC CONCERN.

It is unquestionable that the illicit drug trade which operates throughout the United States tears at the very fabric of society.[9] This is illustrated not only by the increasing number of arrests,[10] but by the expansion of laws designed to limit both the proliferation and use of drugs.[11] The inextricable link to other areas of criminal activity is also readily apparent.[12]

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[9] An estimated $67 billion dollars is spent annually on the social costs of illegal drugs. United States General Accounting Office, *Drug Control - Observations on Elements of the Federal Drug Control Strategy,* 1997 WL 208098 (F.D.C.H. Mar. 14, 1997).

[10] Between 1980 and 1989 *national* drug arrests increased by 134%. Bureau of Justice Assistance, U.S. Dep't of Justice, Pub. No. NJC-144531 Program Brief: Special Drug Courts 1 (1993). Between 1989 and 1998 drug abuse violations increased 19.6%; for those under 18 years of age there was an 85.6% increase in arrests for drug violations. In 1998 alone there were 1,559,100 drug arrests, the highest rate among the 14.5 million arrests that year. 1998 FBI Uniform Crime Rep. for the United States 209-15.

[11] See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984) (codified as amended in scattered titles of the U.S.C.); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986) (codified as amended in scattered sections of titles 18, 21, and 31 of the U.S.C.); Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4312 (1988) (codified as amended in title 21 U.S.C. and in scattered sections of the U.S.C.).

[12] "For example, 15,377 of the 22,540 murders in the United States in 1992 were committed with firearms, of which 1,144 concerned drugs" *United States v. Condren,* 18 F.3d 1190, 1198 (5th Cir. 1994) (citing 1992 FBI Uniform Crime Rep. for the United States 20). Between 1994 and 1998 the total number of murder victims for whom supplemental homicide information was available equaled 89,208. Of that number 4,594 (5.1%)

Acknowledging this fact, the Court in *United States v. Mendenhall,* 446 U.S. 544 (1980), observed that:

> "The public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit. Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances. Much of the drug traffic is highly organized and conducted by sophisticated criminal syndicates. The profits are enormous. And many drugs . . . may be easily concealed. As a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement."

Id. at 561-562. (Powell J., concurring).

Narcotics trafficking is "one of the greatest problems affecting the health and welfare of our population," *National Treasury Employees Union v. Von Raab,* 489 U.S. 656, 668 (1989), causing a "veritable national crisis in law enforcement. . . ." *United States v. Montoya de Hernandez,* 473 U.S. 531, 538 (1985). See also *Florida v. Royer,* 460 U.S. 491, 513 (1983) (Blackmun J., dissenting).

Increased use and distribution of particular narcotics has further defined the war on drugs over the past two decades. Whereas crack cocaine drove the drug policies of the mid 1980's, the emergence of methamphetamine will likely garner the lion's share of the attention in today's war.[13] These facts

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involved narcotic drug laws; 813 (.09%) involved brawls due to the influence of narcotics. 1998 FBI Uniform Crime Rep. for the United States 21.

[13] The recent focus by the federal government on methamphetamine is an obvious reaction to the increased use of this particular drug. The sharp incline has led some experts to conclude that methamphetamine may be become the most frequently abused intravenous drug. Paul V. Konovalov, Note, *On a Quest for Reason: A New Look at Surreptitious Search*

are important if only to reinforce the rise in a phenomena that the courts are all too familiar with.

In sum, there is simply no debate over the impact of illegal drugs in the United States. The lack of a dispute therefore gives rise to the argument that narcotics trafficking parallels, if not exceeds, the concern over the problem addressed in *Sitz*. 496 U.S. at 451. It would seem inherently contradictory for the Court to determine that the public's concern over narcotics trafficking exists on a level far removed from that of eradicating the nation's drunken driving problem based solely on a separate degree of urgency, as the Seventh Circuit majority essentially did. *See Edmond*, 183 F.3d at 663 (No urgent consideration of public safety is shown with Indianapolis's drug roadblock). The concern over narcotics trafficking is simply not minimized by an argument that the effects are not as immediate or dramatic as that of accidents involving alcohol.

To the extent that this Court has found the nation's drunk driving epidemic to satisfy the first *Brown* factor, the same result must follow for a problem that parallels and exceeds that of drunk driving on our nation's highways.

B. DRUG ROADBLOCKS EFFECTIVELY ADVANCE THE PUBLIC INTEREST.

In addressing the *Brown* effectiveness factor, a substantial degree of deference is paid to law enforcement officials who develop the particular roadblocks. The Court in *Sitz* emphasized that *Brown* did not imbue the courts with the

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Warrants, 48 Hastings L.J. 435, 437-38 n.18 (1997). See also, Matt Bai, *White Storm Warning: In Fargo and the Prairie States, Speed Kills*, NEWSWEEK, Mar. 31, 1997, at 66-67 ("[A]n alarming amount of meth is now being made in local 'labs' - bathtubs and closets where anyone with a high-school knowledge of chemistry, and access to hundreds of recipes on the Internet, can cook up a batch himself.").

power to decide "which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." *Sitz*, 496 U.S. at 453. Towards that end, the courts cast aside any role in determining reasonable alternatives, leaving the choice to those officials who possess the unique understanding of the resources needed to combat a particular problem.[14] *Id.* at 453-54.

It certainly follows from this line of reasoning that an absolute number of arrests from any particular roadblock need not be achieved under the second *Brown* factor. Indeed, this Court has historically accepted low "hit rates" in approving checkpoints. *See Martinez-Fuerte*, 428 U.S. at 554 (0.12% arrest rate); *Sitz*, 496 U.S. at 458 (126 stops, 2 arrests, a 1.6% arrest rate).[15] Various factors contribute to the overall success rate during any given checkpoint. In practical terms, law

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[14] For example, the 43rd precinct in the Bronx set up a checkpoint during the spring and summer of 1992 in response to an escalation of street crime, including four drive by shootings. In reviewing the basis for this checkpoint, the Second Circuit found that "at the time of implementation, the checkpoints were reasonably viewed as an effective mechanism to deter criminal behavior in the barricaded area." *Maxwell v. City of New York*, 102 F.3d 664, 667 (2nd Cir. 1996).

[15] As a further example of "hit rates," in July of 1992, Minnesota officials established a narcotics checkpoint on Interstate 35W south of Minneapolis. Between 7:00 p.m. and 11:00 p.m. approximately 650 cars passed through the checkpoint. Of that number approximately 50 cars were diverted for further questioning resulting in a total of seven individuals being cited for narcotics violations, a hit rate of 1.07%. Chris Braeske, *The Drug War Comes to a Highway Near You: Police Power to Effectuate Highway "Narcotics Checkpoints" Under the Federal and State Constitutions*, 11 Law & Ineq. J. 449, 450-51, 463 (1993). In *State v. Damask*, 936 S.W.2d 565 (Mo. 1996), it was reported that in a checkpoint set up along I-44 in Franklin County, Missouri 66 vehicles passed through and 10 vehicles were searched resulting in one arrest, *id.* at 568, a hit rate of 1.5%. Likewise, in *Merrett v. Moore*, 58 F.3d 1547, 1551 (11th Cir. 1995), the Court, in reviewing a "mixed-motive" roadblock, reported a 4.6% vehicle citation rate.

enforcement will likely expect increased or decreased hit rates depending on the location of the checkpoint. In the matter before this Court, a drug hit rate of 5% resulted from checkpoints established within the city limits of Indianapolis. *Edmond*, 183 F.3d at 661. Indianapolis achieved an overall hit rate of 9% when arrests for non-drug related crimes are included. *Id.* Thus, targeting a drug rich environment will likely result in a much higher success rate than checkpoints set up in other locations.[16]

However, the general focus of the effectiveness prong under *Brown* turns not on the numbers achieved but on whether the checkpoint advances the public's interest. *Merrett v. Moore*, 58 F.3d 1547, 1551 (11th Cir. 1995). In the context of mixed-motive roadblocks, safety concerns are generally the guideposts. *Id.*; *Sitz*, 496 U.S. 444. Thus, in checkpoints established to ensure compliance with traffic and motor vehicle laws, the state's interest is sufficiently advanced. *Delaware v. Prouse*, 440 U.S. 648, 658 (1979). The same is true of DUI roadblocks. *Sitz*, 496 U.S. at 455. The mere presence of an alternative or additional motivation behind the checkpoint does not then make it illegitimate.[17] Again, ulterior motives do not invalidate objectively justifiable police conduct. *Whren*, 517 U.S. at 811.

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[16] In *Damask*, the I-44 location was targeted as a known drug route, a fact the Missouri courts had taken judicial note of. *State v. Burkhardt*, 795 S.W.2d 399, 405 (Mo. 1990) (en banc); *State v. Joyce*, 885 S.W.2d 751, 752 (Mo. Ct. App. 1994).

[17] For instance, the presence of a K-9 unit at a roadblock designed to check registration or sobriety fails to implicate any Fourth Amendment concerns. *United States v. Place*, 462 U.S. 696, 707 (1983). Thus, a checkpoint that has been lawfully established cannot then be found constitutionally infirm merely because the state may have the additional purpose of intercepting smuggled narcotics. *Merrett*, 58 F.3d at 1551.

In a situation where other motivations are absent and the establishment of the checkpoint is premised solely on drug detection, the state's interest is certainly advanced. Granted, other law enforcement means exist to detect and seize narcotics, but drug roadblocks substantially advance the states' interest in detecting large shipments of drugs and the very flow of those shipments. The success of the drug trade is dependent upon large scale smuggling by "couriers" or "mules" who traverse the country's roadways — such as I-70 and I-35 across Kansas — carrying substantial amounts of narcotics. Thus, checkpoints provide law enforcement with a reasonably effective means of discovering contraband given that "the flow of traffic tends to be too heavy to allow the particularized study of a given car." *Martinez-Fuerte*, 428 U.S. at 557. As in *Martinez-Fuerte*, the purpose of the checkpoints in question is legitimate and in the public interest. *Id.* at 562. Roadways are the lifeline of the narcotics industry. Stifling an effective means of suppressing the flow of narcotics on those roadways simply because the checkpoint is drug related "would largely eliminate any deterrent to the conduct of well-disguised smuggling operations." *Id.* at 557.

The public's interest in drug eradication is advanced through the implementation of either single or mixed-motive checkpoints. Indeed, these checkpoints provide reasonable methods of narcotics interdiction, while according proper respect to an individual's rights under the Fourth Amendment. The *Brown* effectiveness prong is therefore satisfied in this instance.

C. DRUG ROADBLOCKS DO NOT SUBSTANTIALLY INTERFERE WITH INDIVIDUAL LIBERTY.

The third *Brown* factor is the extent to which a drug roadblock intrudes upon the individual liberty of a motorist, both objectively and subjectively. In this context, the particulars of each roadblock are important in evaluating both

"the duration of the seizure and the intensity of the investigation" and the "fear and surprise engendered in law-abiding motorists by the nature of the stop." *Sitz*, 496 U.S. at 452. In addition, the degree to which the checkpoint interferes with legitimate traffic and the discretion afforded the officers will further define the checkpoint's constitutionality. *Martinez-Fuerte*, 428 U.S. at 558-59.

The similarities between the roadblocks at issue here and those approved by the Court on prior occasions lead to the conclusion that the intrusiveness of drug checkpoints in general is constitutionally indistinguishable. *Sitz*, 496 U.S. at 453.

1. OBJECTIVELY, DRUG ROADBLOCKS INTERFERE ONLY MINIMALLY WITH INDIVIDUAL LIBERTY.

It is conceded that any checkpoint stop will constitute a seizure as the stop "intrude[s] to a limited extent on motorists' right to 'free passage without interruption.'" *Martinez-Fuerte*, 428 U.S. at 556, 557-58 (quoting *Carroll v. United States*, 267 U.S. 132, 154 (1925)); *Sitz*, 496 U.S. at 450. However, this Court has historically refused to draw a bright line on the length of an investigative stop, relying rather on the directive that the seizure "not involve any delay unnecessary to the legitimate investigation of the law enforcement officers." *United States v. Sharpe*, 470 U.S. 675, 686-87 (1985).

In *Martinez-Fuerte* and *Sitz* the Court found the respective detentions to be both brief and minimal. 428 U.S. at 544-48, 558 (3 to 5 minute detention); 496 U.S. at 448, 452 (25 second average delay). More specifically, the Court in *Sitz* found:

> "virtually no difference between the levels of intrusion on law-abiding motorists from the brief stops necessary to the effectuation of these two types of checkpoints, which to the average motorist would seem identical save for the nature of the questions the checkpoint officer might ask."

Id. at 451-52.

This determination is equally applicable to the matter now before the Court. Absent specific questions by law enforcement officers to the motorist about the possible possession of narcotics, the minimal level of intrusion is virtually identical to *Martinez-Fuerte* and *Sitz*.[18]

Any given checkpoint will involve a number of variables, e.g., increased traffic, weather, substantial "hit rates" resulting in increased investigation, etc. Thus, a checkpoint, at its inception, must be designed to limit any potential delays that motorists might encounter, such delays having the greatest potential for constitutional violations and liability. *Merrett*, 58 F.3d at 1552. The level of intrusiveness can be easily calculated through effective planning and the establishment of rigid guidelines designed not only to limit the discretion of the officers involved but also to counter any unforseen problems. Accordingly, organizational planning becomes paramount in order to limit the objective intrusion upon those passing through the checkpoint. *Martinez-Fuerte*, 428 U.S. at 559.[19]

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[18] For example, in *Damask*, the objective intrusion at both checkpoints was viewed as minimal. At the Franklin County checkpoint the officers were limited to checking a driver's license and registration, inquiring whether the driver saw the posted checkpoint signs, and why the driver had exited the road after seeing the sign. The Texas County checkpoint was even less intrusive. There officers did not check licenses and registrations, opting only to question the driver about whether they had observed the checkpoint sign, where they were going, and where they were coming from. In addition, the checkpoints were established in regions that fully minimized potential traffic problems. In all, a motorist was stopped, on the average, for no more than two minutes. 936 S.W.2d at 574.

[19] In his dissent, Judge Easterbrook rightfully noted that Indianapolis took great pains to establish a rigorous protocol for its checkpoint, thus eliminating the unconstrained discretion that was at the heart of this Court's decision in *Delaware v. Prouse*. *Edmond*, 183 F.3d at 670.

It is undisputed that checkpoint stops could fail a constitutional evaluation if they are operated at a level of indiscretion akin to a roving patrol. *Id.* at 558-59. As a result, narcotics checkpoints must be implemented in a manner so that "an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Brown*, 443 U.S. at 51 (citations omitted). Prior case law supports the fact that narcotics roadblocks are indeed established in a manner consistent with these well-settled constitutional principles, as common protocols include, among other things, advance planning, monitoring the time involved in the stop, and responding to potential traffic congestion. *See State v. Damask*, 936 S.W.2d 565, 574 (Mo. 1996); *Merrett*, 58 F.3d at 1549, 1551-52; *State v. Jackson*, 942 P.2d 640, 641-42, 24 Kan. App. 2d 38, 39-40 (1997).

2. SUBJECTIVELY, DRUG ROADBLOCKS INTERFERE ONLY MINIMALLY WITH INDIVIDUAL LIBERTY.

This Court has continually found the level of intrusiveness at checkpoints to be far less than that attending a roving patrol. *United States v. Ortiz*, 422 U.S. 891, 894-95 (1975); *Martinez-Fuerte*, 428 U.S. at 558. Consequently, checkpoints are viewed in a wholly separate context. *Id.*

Courts must account for not only the level of discretion afforded the officers[20] but the potential for fear and surprise

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[20] In *Damask*, the appeals court went to the extent of asking the following: (1) Was the checkpoint conducted according to a plan prepared in advance with the input of both field and supervisory personnel? (2) Does the plan designate specific guidelines to be followed by field personnel? (3) Were the terms of the plan adequately disseminated to the field personnel prior to operation of the checkpoint? (4) Were supervisory personnel on hand to oversee the checkpoint? (5) Was the checkpoint location chosen by supervisory personnel for some nonarbitrary reason? (6) Were all vehicles stopped or, if not, were there specific, nondiscretionary criteria used to

generated by the checkpoint when evaluating the subjective intrusion on motorists. *Sitz*, 496 U.S. at 452. However, the "'fear and surprise' to be considered are not the natural fear of one who [is smuggling narcotics] over the prospect of being stopped at a [narcotics checkpoint] but, rather, the fear and surprise engendered in law-abiding motorists by the nature of the stop." *Id.* This fear, as this Court has found, is minimized by the fact that other vehicles are subjected to the same investigatory measures, that the authority of the law enforcement officers is visibly apparent, and that the fright and annoyance of such an intrusion is much less appreciable than that which might occur during a roving patrol stop. *Ortiz*, 422 U.S. at 894-95.

In light of these factors, the planning stage for a narcotics checkpoint becomes important as it is here that the level of discretion is defined. Guarding against the possibility of unbridled decision making, the field personnel's discretion must be sufficiently circumscribed in order to prevent the operational phase from shifting into a "roving patrol." Thus, a well-documented approach that narrows the discretion of the officers fulfills the constitutional safeguards. Additionally, an advance plan that is authorized by supervisory officers who establish a checkpoint in an area designed to accomplish the intended goal will further sustain the checkpoint's constitutionality. *Martinez-Fuerte*, 428 U.S. at 559.

Minimizing the fear of lawful travelers requires paying a great deal of attention to the actual set up of the narcotics checkpoint. Diminishing citizens' fears will therefore depend largely upon the notice that is supplied and the "visible signs of the officers' authority." *Ortiz*, 422 U.S. at 895. In most, if not all, circumstances motorists will be notified by one or more

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generate a random determination as to which vehicles would be stopped, as opposed to some sort of discretionary selection method? 936 S.W.2d at 574.

large signs signaling the approach of a narcotics checkpoint.[21] *Damask*, 936 S.W.2d at 568 (two signs reading "DRUG ENFORCEMENT CHECKPOINT 1 MILE AHEAD); *Merrett*, 58 F.3d at 1549 ("cones, warning signs, and flashing lights"); *State v. Everson*, 474 N.W.2d 695, 696 (N.D. 1991) (Large sign reading "Please stop"); *Edmond*, 183 F.3d 659 (See Pet. App. at 57a) ("NARCOTICS CHECKPOINT ___ MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP"); *United States v. Ramirez-Gonzalez*, 87 F.3d 712, 713 (5th Cir. 1996) (Large traffic signs posted over 100 yards away which read "Drug Interdiction Checkpoint."); *Jackson*, 942 P.2d at 642, 24 Kan. App. 2d at 39 (Motorists on I-35 advised by five signs stating either "check lane ahead" or "narcotics check lane ahead"). Once the checkpoint is reached, uniformed officers are present to conduct a routine inquiry with the traveler. *Damask*, 936 S.W.2d at 568 (cars found uniformed officer waiting); *Merrett*, 58 F.3d at 1549 (12 officers plus four to five K-9 units present at each checkpoint); *Everson*, 474 N.W. 2d at 696-697 (sheriff's deputies, drug enforcement officers and highway patrol officers present at checkpoint); *Edmond*, 183 F.3d 659 (See Pet. App. at 57a) (stopped cars met by a team of officers, one of whom was in full uniform); *Jackson*, 942 P.2d at 642, 24 Kan. App. 2d at 39 (17 officers at scene). It is clearly evident that having non-uniformed officers conducting the initial contact with the motorists could cause a potential hazard given the lack of apparent authority. It stands to reason that highly visible, uniformed officers will always be present during the primary encounter with a motorist.

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[21] In a very recent decision, the Fourth Circuit found that in a narcotics checkpoint established on Interstate 95 near Ridgeland, South Carolina, motorists were warned of an impending roadblock by "two signs, illuminated by safety flares and reflective lettering, reading 'DRUG CHECKPOINT AHEAD.'" *United States v. Brugal*, No. 98-4255, 2000 WL 345778, at *1 (4th Cir. Apr. 4, 2000).

In practical terms, a narcotics checkpoint is designed not only to minimize the fear that might be instilled in an approaching driver, but to ensure the safety of the officers as well. Towards that end, it seems only prudent that sufficient measures, through the use of large signs, direction cones, and necessary lighting, among other things, will be taken in order to balance the motorists interests with that of law enforcement.

The intrusion visited upon a motorist who is subject to a narcotics checkpoint is minor at most. A well-designed checkpoint will address any potential risks that might otherwise make the seizure unreasonable, thus limiting the interference with individual liberty. *Brown*, 443 U.S. at 51. There is no significant difference between narcotics checkpoints in general and the checkpoints approved in both *Martinez-Fuerte* and *Sitz*. All are similar in design and purpose, varying only in the criminal activity they seek to uncover. Accordingly, drug roadblocks satisfy the final *Brown* factor.

III. THE CONSTITUTIONALITY OF A ROADBLOCK MUST BE ASSESSED UNDER A REASONABLENESS STANDARD AND NOT ON THE EXISTENCE OF EXCEPTIONS.

The majority in *Edmond* ostensibly carves out an exception for roadblocks established by the federal government on an enumerated powers basis. Indeed, the majority acknowledged the "paradoxical implication" of that decision which, rightfully so, would contravene traditional notions of federalism by subjecting the states to greater Fourth Amendment restrictions. *Edmond*, 183 F.3d at 664-65. Evaluation of the constitutionality of a checkpoint must occur under the proper reasonableness analysis; it is *not* dependent on whether an exception exists for a particular federal agency. The Seventh Circuit's majority approach "to normal fourth amendment principles turns that amendment on its head." *Id.* at 670. (Easterbrook, J., dissenting). Any idea that a checkpoint's validity must be predicated on an exception

simply has no constitutional foundation and impinges the states' police powers.

Thus, this Court has found that "for purposes of Fourth Amendment analysis, the choice among such reasonable [law enforcement] alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers." *Sitz*, 496 U.S. at 453-54. Judge Easterbrook's well-reasoned dissenting opinion in *Edmond* is consistent not only with *Sitz*, but with the framers' intent as well, given that "[l]ocal governments should have more, not less, leeway than does the national government to decide how the tradeoff between privacy and effective law enforcement shall be handled." *Edmond*, 183 F.3d at 671 (Easterbrook, J. dissenting).

The unprecedented mobility of today's populace means that politically accountable officials whose law enforcement methods prove ineffective and/or Draconian face the undesirable prospect of being removed at the ballot box and/or losing disgruntled citizens to neighboring communities with more responsive officials. The roadblocks at issue here are precisely the kind of reasonable law enforcement tools that politically accountable officials should be permitted to implement. The success or failure of these roadblocks will ultimately be judged by the citizenry, who will either reward those public officials with reelection or punish them by electing an opponent or relocating to another community.

IV. THIS COURT SHOULD NOT DEPART FROM ITS WELL-ESTABLISHED CASE LAW.

Balancing the state's interests against the individual liberty of a motorist in a fixed checkpoint context, this Court has, on several occasions, approved checkpoints. Indeed, in *Martinez-Fuerte*, *Sitz*, *Prouse*, and *Brown*, this Court has approved the establishment of checkpoints that are minimally intrusive and

sufficiently limit the discretion of individual officers. In the final analysis, narcotics roadblocks are constitutionally permissible. The strictures of the Fourth Amendment are not violated because the "balance of the State's interest in [eradicating narcotics trafficking], the extent to which [these checkpoints] can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state . . . ." *Sitz*, 496 U.S. at 455.

CONCLUSION

For the foregoing reasons, this Court should reverse the Seventh Circuit's decision.

Respectfully submitted,

CARLA J. STOVALL
Kansas Attorney General
STEPHEN R. MCALLISTER
Kansas State Solicitor
(Counsel of Record)
JARED S. MAAG
Assistant Attorney General
120 S.W. 10th Avenue, 2nd Fl.
Topeka, Kansas 66612-1597
(786) 296-2215

Counsel for Kansas and the Amici States

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BILL PRYOR
Attorney General
State of Alabama

JANET NAPOLITANO
Attorney General
State of Arizona

MARK PRYOR
Attorney General
State of Arkansas

BILL LOCKYER
Attorney General
State of California

JOHN M. BAILEY
Chief State's Attorney
State of Connecticut

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

JAMES E. RYAN
Attorney General
State of Illinois

KAREN M. FREEMAN-WILSON
Attorney General
State of Indiana

THOMAS J. MILLER
Attorney General
State of Iowa

MICHAEL C. MOORE
Attorney General
State of Mississippi

DON STENBERG
Attorney General
State of Nebraska

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

JAN GRAHAM
Attorney General
State of Utah

MARK L. EARLEY
Attorney General
State of Virginia